

Immunities That You Enjoy as a Commissioner

As a LUC commissioner, there are two primary immunities that protect you from **civil** liability.

1. Statutory immunity or indemnification under HRS § 26.35.5(b)

The statute provides that: "Notwithstanding any law to the contrary, no member shall be liable in any civil action founded upon a statute or the case law of this State, for damage, injury, or loss caused by or resulting from the member's performance or failing to perform any duty which is required or authorized to be performed by a person holding the position to which the member was appointed, unless the member acted with a malicious or improper purpose, except when the plaintiff in a civil action is the State." *See Medeiros v. Kondo*, 55 Haw. 499 (1974).

The statute further provides that "the State shall indemnify a member from liability by paying any judgment in, or settlement or compromise of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction, including fees and costs incurred (This provision does not apply to a member who acts for a malicious or improper purpose.)

2. The doctrine of absolute quasi-judicial immunity confers onto officials exercising their quasi-judicial authority all of the immunities that a judge possesses under the doctrine of absolute judicial immunity. *Grant v. Shalala*, 989 F.2d 1332 (3rd Cir. 1993) (Administrative law judge is functionally comparable to that of a judge.) The immunity that a judge and other officials that exercise quasi-judicial functions possess is **absolute**. Absolute means having no restriction, exception or qualification. It means under all circumstances. A judge's immunity is not limited to immunity from liability for judicial actions but immunity from suit. *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (Judicial immunity is an immunity from suit, not just from the ultimate assessment of damages).

Declaratory rulings by agencies:

HRS § 91-8 provides that:

Any interested person may petition an agency for a declaratory order as to the **applicability** of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedures for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders. [emphasis added.]

Declaratory rulings have a unique and independent role in the statutory scheme. *Citizens Against Reckless Development v. Zoning Board of Appeals*, 114 Hawai'i 184 (2007). "Applicability" is interpreted to mean a special type of procedure, whereby an interested party could seek agency advice as to how a statute or agency rule, or agency order would apply to particular circumstances not yet determined. That is, 91-8 is designed to provide a means for securing from an agency its interpretation of relevant statutes, rules and orders. *Citizens Against Reckless Development v. Zoning Board of Appeals*, 114 Hawai'i 184 (2007).

Agencies cannot nullify statutes, nor can they adjudicate the constitutionality of a statute.

An appellant may challenge the constitutionality of a statute in circuit court at the same time that it challenges the agencies action. *HOH Corp. v. Motor Vehicle Licensing Board*, 69 Haw. 135 (1987).

An agency can interpret a statute or rule and its interpretation is subject to appeal under HRS § 91-14, under the "right/wrong" standard.

By empowering agencies generally with the power to adopt rules regarding the manner in which declaratory rulings petitions are to be considered and disposed of, the legislature has granted agencies discretion with regard to the consideration of declaratory rulings. See *Citizens*. HRS § 91-8 and the LUC's Admin. Rules are to be read in tandum, see *Paul's Electric*, 104 Hawai'i @ 417, so that the reviewing court can examine the agency's action for an abuse of discretion.

In *Citizens*, the Court stated:

The HAPA (chapter 91) provides a party with several separate means of seeking review of agency determinations. Two provisions apply to agency rules: (1) under HRS § 91-6, an interested party may petition an agency to adopt, amend, or repeal an existing rule; and (2)

under HRS § 91-7, such party may seek a judicial declaration as to the validity of an agency rule. Final agency decisions or orders in contested cases may be appealed to the circuit court as provided in HRS § 91-14.

LUC rules, like statutes, have the force and effect of law. *State v. Kotis*, 91 Hawai'i 319 (1999). LUC rule § 15-15-98 provides that: "On petition of an interested person, the commission **may** issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission." Further, the commission on its own motion or upon request, "may issue a declaratory order to terminate a controversy or to remove uncertainty." In *Asato v. Procurement Policy Board*, 132 Hawai'i 333 (2014), the Hawai'i Supreme Court expanded the definition of "interested person" to mean a person who is without restriction affected by or involved with the validity of an agency rule.

LUC rule § 15-15-100 provides that the commission has ninety days to either deny the petition, issue a declaratory order on the matter or set the matter for a hearing, in which the commission must issue its findings and decision within one hundred twenty days after the close of the hearing.

LUC rule § 15-15-102 provides that the commission, for good cause, may refuse to issue a declaratory order when: 1) the question is speculative or hypothetical and does not involve existing facts, or facts that can be expected to exist in the near future; 2) the petitioner's interest is not the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief; 3) the issuance of the declaratory order may affect the interests of the commission in a litigation that is pending or may reasonably be expected to arise; or 4) the matter is not within the jurisdiction of the commission.

A declaratory order of the LUC not to issue a declaratory order is reviewable in circuit court under the abuse of discretion standard. *See Citizens*.

HRS Chapter 343 review process.

In *In re Water Use Permit Application*, 94 Hawai'i 96 (2000), it was stated that the Commission on Water Resource Management must not relegate itself to the role of a mere umpire patiently calling balls and strikes for adversaries appearing before it but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process.

Courts have held that an EIS complies with NEPA when its form, content and preparation substantially: 1) provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences and 2) make information of the proposed project's environmental impact available to the public and encourage public participation in the development of the information.

When it is not necessary that all environmental effects of the proposed action be known, it is necessary that the EIS indicate the extent to which environmental effects are uncertain and unknown.

A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize issues, but also affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.

Adequacy of EIS. Does the EIS contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action. A good faith effort with sufficient information to enable a decision-maker to consider fully environmental factors involved and to make a reasonable decision after balancing the risks and harms to the environment against the benefit to be derived from the proposed action as well as to make a reasoned choice between alternatives. There is no requirement that it be free from controversy, scientifically perfect, or that all experts agree with the conclusion.

The information required in an environmental impact statement varies from project to project. An agency is required to take a "hard look" at the environmental consequences before approving a project. *Price v. Obayashi Hawaii Corporation*, 81 Hawai'i 171 (1996); *Life of the Land v. Ariyoshi*, 59 Haw. 156 (1978). "Hard look" need not be an exhaustive attempt to point out all possible details bearing on the proposed action but will be upheld as

adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. *Life of the Land* at 164-165.

Admin. rule § 11-200-23 provides:

- A. Acceptability of a[n] [environmental impact] statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informed instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.
- B. A statement shall be deemed to be an acceptable document by the accepting authority or approving agency only if all of the following criteria are satisfied:
 - 1. The procedures for assessment, consultation process, review, and the preparation and submission of the statement have been completed satisfactorily as specified in this chapter;
 - 2. The content requirements described in this chapter have been satisfied; and
 - 3. Comments submitted during the review process have received responses satisfactory to the accepting authority; or approving agency, and have been incorporated in the statement.

